IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 934

WILLIAM A. DOSS,

Petitioner,

vs.

E. E. LINDSLEY, Sheriff, Piatt County, Illinois,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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CITATIONS.

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STATEMENT.

The facts, in so far as they are exigent with respect to a decision of this case, are fully stated in the opinion of the district court, which was made the opinion of the Circuit Court of Appeals, and in the opinion of the Supreme Court of Illinois in the case of *People* v. *Doss*, 382 Ill. 307, which opinion and decision petitioner seeks to assail by the present proceeding. The opinion of the Supreme Court of Illinois has been reprinted in full as an

Appendix to this brief for the immediate convenience of this court.

The following very few words summarize the facts sufficiently to indicate the questions presented in this case.

The petitioner, being under investigation by a grand jury in connection with accusations of criminal libel, disseminated thousands of copies of a mimeographed publication which he called *The Liberty Press,* in which he vituperatively assailed the integrity of the State's Attorney and many other members of the bar and exhorted the grand jury to investigate and indict the State's Attorney instead of investigating and indicting the petitioner. His publication of this exhortion and ts text and contents have at all times been admitted. The courts of Illinois, rejecting petitioner's contentions that such publication represented an exercise of his right of free speech, have ruled that it constituted an attempt to tamper with and corruptly influence a grand jury and, treating the publication as contemptuous, have held him subject to a fine of $500 and three months' imprisonment.

Petitioner filed a petition in this court for a writ of *certiorari,* but the same was denied as having been filed not within apt time. Upon denial by this court of petitioner's application for *certiorari* **and before petitioner was in custody,** he applied to the United States District Court for the Eastern Division for a writ of *habeas corpus* against the sheriff.

That court, as appears from its carefully written opinion, denied petitioner relief on the ground that, since he was not in custody, his body could not be produced by the respondent in response to the process of *habeas corpus.* The court did, however, consider and announce its ruling to the effect that *first,* petitioner had not exhausted other

adequate and available remedies before resorting to *habeas corpus*, and *second*, if petitioner's substantive question of the constitutional right of free speech could properly be entertained, then such contention was without merit.

It is so singular as to be astonishing that, although the only actual ground of decision was that petitioner was not in respondent's custody and hence could not be produced in response to a writ of *habeas corpus*, petitioner does not argue or even discuss that contention in this court.

THE QUESTIONS PRESENTED.

I.

Did the trial court err in denying petitioner relief on the ground that he was not in custody at the time of his application for the writ of *habeas corpus?*

II.

If the writ was not properly denied because petitioner was not in the custody at the time of the application therefor, should the writ have been denied upon the further ground assigned by the district court, namely, the ground that petitioner had not exhausted other adequate and available remedies before resorting to *habeas corpus*?

III.

If petitioner's substantive claim of the right to free speech is properly before this court, did petitioner's conduct amount to an exercise of the right of free speech or to activity contemptuous of the court which invoked the grand jury and not within the protection of the Fourteenth Amendment?

ARGUMENT.

I.

The court below properly refused the writ because petitioner was not in custody at the time of the application therefor.

The only actual ground of decision, as distinct from expressions of opinion in the nature of *dicta*, upon which the petitioner's present application for *habeas corpus* was refused was that petitioner was not in custody at the time that he applied for the writ. The district court used and the circuit court of appeals adopted the following language of the District Court:

> "In *McNally* v. *Hill, Warden*, 293 U. S. 131 at 138, the court said: 'Without restraint of liberty, the writ will not issue. *Wales* v. *Whitney*, 114 U. S. 564; *Stallings* v. *Splain*, 253 U. S. 339, 343. Equally, without restraint which is unlawful, the writ may not be used. *A sentence which the prisoner has not begun to serve can not be the cause of restraint which* the statute makes the subject of inquiry.'
>
> "From the language of the Supreme Court, it appears that where, as here, petitioner has not been arrested, his application is premature, for he is, as yet, deprived of no freedom of action. I think further that the question is not whether one who is not on bond may apply for a writ, but rather whether one convicted but not arrested may so proceed. This I think he may not do. * * *" (Italics of the court.)

There is not the slightest doubt that this conclusion was the only correct one. The summary, extraordinary and highly prerogative writ of *habeas corpus* lies only to inquire into and, in proper cases, to relieve against actual imprisonment and not to prevent threatened imprisonment.

Its office is to command production of the body. Quite clearly the writ will not lie against one who has not custody of and therefore cannot produce the body of the petitioner.

In *Johnson* v. *Hoy,* 227 U. S. 245, petitioner, who had been indicted for violation of the White Slave Traffic Act, applied for a writ of *habeas corpus* "on the ground (1) that excessive bail was required, on terms onerous and prohibitive, and (2) that the act under which he had been indicted was unconstitutional and void." But it appeared that, in the language of this court, on November 15, 1912, Johnson had given a bond, which had been approved by the district judge, and had been released from arrest under the indictment. This court said, at pages 247-48:

> "* * * But even if it could be claimed that the facts relied on presented any reason for allowing him a hearing on the constitutionality of the act at this time, the defendant would not be entitled to the benefit of the writ, because since the appeal he has given bond in the District Court and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. * * *"

This court has always held that the "constructive restraint" of a petitioner by legal process and bail, even though the abridgment of the petitioner's liberty while he is at large upon bail is very substantial, and even though he is subject to physical capture and detention at any time, as, for instance, if his surety surrenders him, does not constitute that corporal detention of his body which is requisite to support the writ of *habeas corpus.*

A case very much on point is *Stallings* v. *Splain,* 253 U. S. 339. In that case the petitioner, having been indicted in the District of Wyoming for a federal offense, was

arrested and physically incarcerated in the District of Columbia. While thus actually incarcerated he filed his petition for *habeas corpus*. But before the petition was disposed of, petitioner was enlarged upon bail. His situation was thus precisely comparable in all respects material to that of petitioner in the instant case. In the *Stallings* case, petitioner was not only liable to be surrendered at any time by his bondsmen, and was not only confined in his movements to the territory within the limits of the District of Columbia, but was facing removal to Wyoming. In the instant case, although there was extant a *mittimus* for the incarceration of petitioner, petitioner was and still is physically at liberty.

In the *Stallings* case this court, speaking through Mr. Justice Brandeis, said at page 343:

> "The admission to bail by the Commissioner to answer the indictment in the District of Wyoming was upon his own request on advice of counsel. When this bail was given no application had been made to the court for his removal; and there had not even been an order of the Commissioner that he be held to await such application. He ceased, therefore, to be in the position ordinarily occupied by one who is contesting the validity of his detention and who has been released on bail pending the *habeas corpus* proceeding. *Sibray* v. *United States,* 185 Fed. Rep. 401. Stallings' position was thereafter no better than if he had applied for the writ after he had given bail. It is well settled that under such circumstances a petitioner is not entitled to be discharged on *habeas corpus*. *Respublica* v. *Arnold,* 3 Yeates, 263; *Dodge's Case,* 6 Martin, 569; *State* v. *Buyck,* 1 Brev. 460. Being no longer under actual restraint within the District of Columbia, he was not entitled to the writ of *habeas corpus*. *Wales* v. *Whitney,* 114 U. S. 564."

The case of *Wales* v. *Whitney,* 114 U. S. 564, contains an exhaustive review of the common law authorities. In

that case an officer of the navy, though physically circumscribed in his movements by an order from a superior officer to remain in the District of Columbia subject to trial on charges pending before a court martial, was held not to be detained. The navy officer contended that he was not subject to imprisonment or detention upon the particular facts in the case, by military authorities. His imprisonment and detention consisted of an order to remain within the confines of the District of Columbia under a sort of constructive military arrest and to await trial in the District before a court martial for the immediate convenience of the court. We quote at some length in the margin the review by Mr. Justice Miller of the earlier authorities.*

* "The present case bears a strong analogy to *Dodge's* Case in 6 Martin, La. 569. It appeared there that the party who sued out the writ had been committed to jail on execution for debt, and having given the usual bond by which he and his sureties were bound to pay the debt if he left the prison bounds, he was admitted to the privilege of those bounds. The plaintiff in execution failing to pay the fees necessary to the support of the prisoner, the latter sued out a writ of *habeas corpus*.

"That eminent jurist, Chief Justice Martin, said, on appeal to the Supreme Court: 'It appears to us that the writ of *habeas corpus* was improperly resorted to. The appellee was under no physical restraint, and there was no necessity to recur to a court or judge to cause any moral restraint to cease. The sheriff did not retain him, since he had admitted him to the benefit of the bounds; the doors of the jail were not closed on him, and if he was detained it was not by the sheriff or jailer. If his was a moral restraint it could not be an illegal one. The object of the appellee was not to obtain the removal of an illegal restraint from a judge, but the declaration of the *court* that the plaintiffs in execution had by their neglect lost the right of detaining him. A judgment declaring such neglect, and pronouncing on the consequences of it, was what the appellee had in view.' The judgment awarding the writ was reversed. The analogy to the case before us is striking.

"A very similar case was passed upon by the Supreme Court of Pennsylvania in *Respublica* v. *Arnold*, 3 Yeates, 263. A party who had been indicted for arson, and had given bail for his appearance to answer the indictment, applied, while out under bail, to be discharged by writ of *habeas corpus*, on the ground of delay in the prosecution. The court held that the statute of Pennsylvania, which was a re-enactment of the *habeas corpus* act of 31 Charles II., ch. 2, spoke of persons *committed* or *detained*, and clearly did not apply to a person out on bail. And Mr. Justice Yeates very pertinently inquires 'would not a *habeas corpus* directed to the bail of a supposed offender by perfectly novel?' And Smith J., said that the inclination of his mind was that *habeas corpus* could not lie to the bail. (Quotation continued on next page.)

After this review of authorities, Mr. Justice Miller, speaking for the court, concludes:

> "In the case of a person who is going at large, with no one controlling or watching him, or detaining him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner, or by his capture and forcible traduction into the presence of the court."

In the Statement of the Case we have already commented upon the astonishing circumstance that, although the trial court's holding was placed solely upon the ground that petitioner was not in custody at the time of his application for the writ, or at the time of the return thereof, pe-

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"In a note to the cases of *Rex* v. *Dawes* and *Rex* v. *Kessel*, 1 Burrow, 638, the same principle is stated, though by whom the note is made does not appear. Both these persons were brought before Lord Mansfield, in the King's Bench, on a rule against the commissioners to enforce an act of Parliament to increase the army. In both cases the ground on which the discharge was asked was, that they were illegally pressed into the service. Lord Mansfield discharged one because his statement was found to be correct, and refused the other because his statement was not true.

"The note to the report, apparently in explanation of the fact that they were not brought before the court by writ of *habeas corpus*, and that no objection was taken to the rule by the commissioner, says: 'Neither of these could have brought a *habeas corpus;* neither of them was in custody. Davies had deserted and absconded, and Kessel had been made a corporal. No objection was made by the commissioner to the propriety of the method adopted.' In the continuation of Chief Baron Comyns' Digest, published in 1776, and in Rose's edition of that Digest, these cases are cited as showing that the parties could not bring *habeas corpus*, because they were not in custody. Comyns' Digest, Continuation, p. 345; 4 Comyns' Dig. (4th ed. 8vo, London, 1800) 313; *Habeas Corpus B.*

"While the acts of Congress concerning this writ are not decisive, perhaps, as to what is a restraint of liberty, they are evidently framed in their provisions for proceedings in such cases on the idea of the existence of some actual restraint. Rev. Stat. § 754 says the application for the writ must set forth 'in whose custody he (the petitioner) is detained, and by virtue of what claim or authority, if known;' § 755, that 'the writ must be directed to the person in whose custody the party is; § 757, that this person shall certify to the court or justice before whom the writ is returnable the true cause of the detention; and by § 758 he is required 'at the same time to bring the body of the party before the judge who granted the writ.'

"All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary."

titioner does not argue any question raised by this holding. Instead, for reasons as to which he alone is advised and of the soundness of which he alone is the judge, but which are quite incomprehensible to us, he has chosen to argue only upon his altercation with the holding of the Supreme Court of Illinois, namely, the acts of which he admits commission were contempt of court. Although it is believed that these contentions, if they are properly before the court, are fully answered under Point III, *post*, of this brief, we submit that upon the reasoning of the District Court, with which petitioner does not argue, the petition was properly dismissed because petitioner was not in custody and could not have been brought before the court by the respondent at the time of his application for the writ of *habeas corpus*.

II.

Petitioner has not exhausted more appropriate means than habeas corpus for the vindication of his alleged rights.

There existed a very orderly procedure whereby the petitioner could have and should have elicited this court's rulings upon the substantive contention which he now seeks to make. He could have and should have, within apt time after the affirmance of his sentence and commitment for contempt, prosecuted an application for this court's writ of *certiorari* to review the decision of the Supreme Court of Illinois. (Illinois Supreme Court decision, *People* v. *Doss*, 382 Ill. 307.) Although petitioner did file a petition for writ of *certiorari*, he did so in apt time. On October 11, 1943, this court entered a memorandum opinion (320 U. S. 762) as follows: "No. 100. *Doss* v. *Illinois*. October 11, 1943. Petition for writ of certiorari to the Supreme Court of Illinois denied for the reason

that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350."

He filed a petition for rehearing with respect to the order last set forth, which was denied on November 15, 1943 (320 U. S. 813).

Petition for *certiorari* is the ordinary, *habeas corpus* an extraordinary remedy. The recent press of *habeas corpus* cases has constrained this court to recur many times to its decisions in *Ex Parte Hawk*, 321 U. S. 114, and *Mooney* v. *Holohan*, 294 U. S. 103. Both of these cases hold that a petitioner should pursue the ordinary course afforded to him by state supreme and appellate procedure before invoking the special and limited jurisdiction of federal courts by the extraordinary and summary remedy of *habeas corpus*.

By failing to elicit this court's review of the Illinois Supreme Court's decision upon seasonable application for the writ of *certiorari*, he has brought himself squarely within the teaching of this important principle.

Both the District Court and the Circuit Court of Appeals assign the further ground for denying petitioner access to the federal courts upon *habeas corpus* the fact that he had not applied to the Illinois courts for *habeas corpus*. In fairness to the petitioner and to this court, we are compelled to confess that, since the Supreme Court of Illinois has passed directly and adversely to petitioner upon the only substantive contention that he makes here, namely, his contention that his communications to the grand jurors were an exercise of his constitutional right of free speech and hence could not have been contemptuous, it should be fairly presumed that further recourse to the Illinois courts would be unavailing.

But this does not excuse his failure to properly and aptly to prosecute his application for *certiorari* to this court. For this reason, the writ of *habeas corpus* was properly denied.

III.

There is no merit in petitioner's substantive contention that his acts were an exercise of his constitutional right of free speech.

Although we submit that the petitioner's substantive claim of the constitutional right of free speech is not properly before this court in this proceeding, *first,* because petitioner, not being in custody, was not subject to production on *habeas corpus* (Point I, *ante*) and *second,* because he failed to exhaust ordinary before pursuing extraordinary remedies (Point II, *ante,*) nevertheless under the present Point we address petitioner's contentions as though they were properly before this court in a proceeding free from jurisdictional infirmities or procedural inhibitions.

The justices of this court need no instruction from the Attorney General of Illinois upon the evolution of the grand jury as an organ of government. This court knows that originally, jurors, both grand and petit, were not only permitted but were expected to give their verdicts and to make their presentment upon their own personal knowledge, information, belief or conjecture. Indeed, as this court knows, jurors were originally witnesses, then were permitted to "consult" with persons who were allowed to "testify" but not to vote, and finally, in the case of petit juries, were required to find their verdict only upon evidence and, so far as human psychology, aided by the instruction and admonition of a court will permit, to ex-

clude from their mind all personal knowledge, particular or peculiar to the case.

This brief reference to the well known evolutionary process by which the present jury system emerged from a Teutonic forum or assembly of fact triers teaches that, in the state courts, at least, the Federal constitution, which does not guarantee either indictment or trial by jury at all in state courts, imposes no inhibitions upon the reasonable development and evolutionary modification of juridical concepts implicit in either trial or presentment by jury, petit or grand. Illinois was committed long before the *Doss* case to the view, modern and progressive, which inhibits grand juries, as well as petit juries, from availing themselves of common gossip as either incitement to act or evidence upon which to act.

The case of *People* v. *Parker*, 374 Ill. 524, so thoroughly discussed this point that in petitioner's case, it was necessary only to cite the *Parker* case. We quote from the *Parker* case the Supreme Court's perception of the flux and contrarity of opinion upon the appropriate function of a grand jury with respect to informal or other unofficial communications either of matter of fact or matter of course. In frank recognition that the evolution of the modern jury system from a primitive mode of what might be called presentment and trial by gossip, the Supreme Court said at page 528:

> "The authorities in other jurisdictions cannot be harmonized. Some courts hold that a stranger has a right voluntarily to bring facts to the knowledge of the grand jury. (*In re Lester*, 77 Ga. 143; *State* v. *Stewart*, 45 La. Ann. 1164.) On the other hand, Wharton, in his treatise on Criminal Practice and Pleading, eighth edition, section 307, states: 'Sending an unofficial volunteer communication to the grand jury, inviting them to start, on their own authority,

> a prosecution, is a contempt of court, and a misdemeanor at common law.' To this same effect is *Commonwealth* v. *Crans*, 2 Pa. L.J. 172."

This represents the settled and declared jurisdiction of Illinois on the question.

Mr. Justice Field, in a celebrated charge to a federal grand jury which has been frequently quoted, 30 Fed. Cases 992, spoke as follows:

> "You will not allow private prosecutors to intrude themselves into your presence and present accusations. Generally such parties are actuated by a private enmity and seek merely the gratification of their personal malice. If they possess any information justifying the accusation of the person against whom they complain they should impart it to the district attorney who will seldom fail to act in a proper case, but if the district attorney should refuse to act they can make their complaint to a committing magistrate before whom the matter can be investigated and if sufficient evidence be produced of the commission of the public offense by the accused, he can be held to bail to answer to the action of the grand jury."

He is also quoted by Wharton on Criminal Procedure, tenth edition, section 1295, as follows:

> "There has hardly been a session of the grand jury of this court for years at which instances have not occurred of personal solicitation to some of its members to obtain or prevent the presentment or indictment of parties. And communications to that end have frequently been addressed to the grand jury filled with malignant and scandalous imputations upon the conduct and acts of those against whom the writers entertain hostility, and against the conduct and acts of former and present officers of this court and of previous grand juries of this district. All such communications were calculated to prevent and obstruct the due administration of justice, and to bring the proceedings of the grand jury into contempt. 'Let any reflecting man', says a distinguished judge, 'be

> he layman or lawyer, consider of the consequences which would follow, if every individual could, at his pleasure, throw his malice or his prejudice into the grand jury room, and he will, of necessity, conclude that the rule of law which forbids all communication with grand juries, engaged in criminal investigations, except through the public instructions of courts and the testimony of sworn witnesses, is a rule of safety to the community. What value could be attached to the doings of a tribunal so to be approached and influenced? How long would a body, so exposed to be misled and abused, be recognized by freemen as among the chosen ministers of liberty and security? The recognition of such a mode of reaching grand juries would introduce a flood of evils, disasterous to the purity of the administration of justice, and subversive of all public confidence in the action of these bodies.' "

Illinois has long had a statute requiring proceedings before her grand juries to be secret. The Illinois Criminal Code (Ill. Rev. Stats., 1943, Ch. 38, Par. 720, p. 1226), which prohibits disclosures of matters occurring in the grand jury room, has been enforced by the Supreme Court of Illinois so as to prevent the communication, even in court, of the substance of grand jury proceedings. *Gitchell* v. *People*, 146 Ill. 175.

The policy of forbidding informal and unofficial communications with grand jurors, even when such communications are moderate in tenor and do not amount to an attempt to incite in the grand jury a lack of confidence in the prosecuting official, has found utterance in congressional enactment. Section 137 of the U. S. Criminal Code (U.S.C.A. Title 18, Sec. 243) provides as follows:

> "Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, * * * by writing or sending to him any letter or any communication, in print or writing,

in relation to such issue or matter, shall be fined not more than $1,000, or imprisoned not more than six months, or both."

An examination of the case of *Duke* v. *United States*, 90 Fed. (2d) 840, (*certiorari* denied, considered on certification of question, 301 U. S. 492, *certiorari* denied after decision by Circuit Court of Appeals, 302 U. S. 685), indicates that this court has considered, otherwise than by merely denying *certiorari, the* constitutionality of this statute and has implicitly held it constitutional. In the Circuit Court of Appeals for the Fourth Circuit (90 Fed. (2d) 840), Duke assailed the constitutionality of this statute upon the specific ground that its enforcement violated his constitutional right of free speech. The Circuit Court of Appeals rejected this contention in language quoted in the margin*.

This court denied *certiorari*. (302 U. S. 685.)

Although we are mindful that mere denial of *certiorari* does not of itself import this court's approbation of the opinion of the lower court, in the *Duke* case, the Circuit Court of Appeals had certified to this court a question (raised by Duke's contention that he could not be prosecuted by information) which this court answered adversely to Duke in 301 U. S. 492. Although this court did not expressly discuss the constitutional issue, it was apprised of Duke's contention that the statute was unconstitutional and nevertheless approved his conviction, though it wrote an opinion on another phase of the case. We therefore

*"There is no right on the part of one whose conduct is being investigated by a grand jury to petition the grand jury or to appear before it, which is guaranteed by the Constitution or otherwise; and it is important that the processes of criminal justice be not thus interfered with by those who have reason to think that their conduct is under investigation. * * * Congress for the protection of grand and petit jurors from this sort of interference has not only forbidden attempts to influence them 'corruptly, or by threats or force, or by any threatening letter of communication' (section 135, Crim. Code, 18 U. S. C. A. #241), but has also forbidden any attempt to influence by the sending of any letter relating to any matter pending before them."

read this case as a strong intimation of this court's approval of the constitutionality of the federal act.

Petitioner in the instant case seeks to derive some comfort from the fact that the State of Illinois has adopted no such statute, but the only question which petitioner may properly address to this court is whether the State of Illinois may prohibit unofficial communications to grand jurors. No question of Illinois distribution of powers can be a Federal question. What Illinois might do by her General Assembly, she may do by the evolution of her common law with respect to her conception of her grand jurors and with respect to her conception of their inquisitorial office in public prosecutions.

In any event, petitioner is incorrect in his premise, for Illinois officially has a statute already cited, making grand jury proceedings secret. A broadside of publication of charges vitiates the secrecy of grand jury proceedings

Petitioner's contention that his communications represented a seemly approach to the grand jurors hardly deserves a reply. Petitioner's communications were far more than a mere statement of facts with respect to which petitioner was prepared to give evidence if required. They abounded in inflammatory epithets, vituperative characterizations, intended and calculated to engender the passions of the grand jurors and to prevent a calm investigation into the charges against petitioner.

Little need be said with regard to the *Bridges* case. A judge is presumed to be reasonably free from impulsion by an inflammatory press. If any such presumption attended jurors, every juror who was locked up to protect his verdict from affection by informal communication would give such a confined juror a right to the writ of *habeas corpus*.

We submit that no serious or substantial issue or freedom of speech was involved in this case.

IV.

Petitioner's other contentions are not substantial.

We shall not reply to petitioner's contention that a fine of ~~$500~~ and three months in jail is a cruel and unusual punishment.

Petitioner's contention that he was denied a trial, by jury or otherwise, upon the charges made is of course without the slightest merit. He admitted the fact and the contents of the publications. No question of his motive was properly before the court. He admitted the making of publications which were intended to influence the grand jury in its actions. If we are correct in the contentions advanced under point III of this argument, that is, the contention that the publication of any communication intended to influence the grand jury may constitutionally be punished as contemptuous, it follows necessarily that petitioner may be punished; for he admits in this Court that the intent of his publications was to influence the action of the grand jury.

CONCLUSION.

For the reasons stated in the opinion of the District Court and the Circuit Court of Appeals and urged in this brief, it is respectfully submitted that petitioner's application for *certiorari* should be denied.

Respectfully submitted,

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